84-1061

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No. 84-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

MICHAEL MERCHENT, D.O.,
S. W. MEYER, D.O.

Petitioners,

v.

JEN D. CUBBAGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a white pages listing in the Parker, Arizona telephone directory, which is distributed in a bordering California community, and the obtaining of a Medi-Cal provider number for billing purposes constitutes sufficient interjection by two Arizona physicians into the State of California to warrant personal jurisdiction for a claim arising out of emergency medical treatment occurring in Arizona when the patient/plaintiff was not enrolled in the Medi-Cal program and did not rely on the white pages listing.

PARTIES INVOLVED IN THE COURT OF APPEALS

The plaintiff-appellant in the court below, respondent herein, is Jen Cubbage. The petitioners herein, defendants-appellees below, are Michael Merchent, D.O., and S. W. Meyer, D.O. The other defendant-appellee, not participating as a petitioner herein, is the Parker Community Hospital.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Michael Merchent, D.O. and S. W. Meyer, D.O., hereby petition for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINIONS BELOW

The order of the United States District Court for the Central District of California granting Defendant/Appellees' Motion to Dismiss for lack of personal jurisdiction is included as Appendix D. The unreported opinion of the Court of Appeals is annexed as Appendix A. A timely Petition for Rehearing was denied, and a companion suggestion of the appropriateness of a rehearing en banc rejected, by Order of the Court of Appeals entered on October 3, 1984. (Appendix B.) An Order nunc pro tunc was entered on Octo-

ber 16, 1984 denying petitioners' Petition for Rehearing as of October 3, 1984. (Appendix C.)

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was issued on May 11, 1984. A timely petition for rehearing was denied, and a companion suggestion of the appropriateness of rehearing en banc rejected, by Order of the Court of Appeals entered on October 3, 1984 (Appendix B), and this Petition is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, U.S. Const. Amend XIV, § 1 provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 410.10 of the Cal. Code Civ. Pro. § 410.10 provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States.

STATEMENT OF THE CASE

This is a medical malpractice action arising out of treatment rendered to the Respondent by the petitioning physicians, Merchent and Meyer, in Arizona in November 1981. Petitioners Merchent and Meyer are Arizona citizens licensed to practice medicine in Arizona. Petitioner Merchent is a surgeon who works primarily in the emergency

room of the Parker Community Hospital. Petitioner Meyer is a general practitioner.

Parker Community Hospital is an Arizona corporation which has its principal place of business in Parker, Arizona. Parker is located in a sparsely populated desert region in Arizona separated from California by the Colorado River. The treatment provided to Respondent occurred in Parker, Arizona. Neither Petitioners Merchent nor Meyer are licensed to practice medicine in the State of California. Respondent is a California resident.

Petitioners Merchent and Meyer, and the Parker Community Hospital ("Hospital"), moved to dismiss the Complaint for lack of personal jurisdiction pursuant to Rule 12(b)(2), Federal Rules of Civil Procedure. At the first hearing on Defendants' Motion, the District Court granted Plaintiff leave to engage in discovery on the issue of personal jurisdiction. That discovery revealed that a very small number of the patients treated by Dr. Merchent are California residents. Because the hospital does his billing, Dr. Merchent testified in his deposition that he did not know whether he had treated any patients who had California addresses, or whether a Medi-Cal provider number had been assigned to him. Dr. Meyer estimated that approximately 12% of his patients had California addresses.

Discovery also revealed that each physician had treated a small number of patients insured under the Medi-Cal program, California's supplemental program to Titles VI and XVI of the Social Security Act, and had received reimbursement either directly or indirectly from the State of California for these patients. Finally, it was found that the Parker, Arizona white pages telephone directory contained a listing for both Drs. Merchent and Meyer, and that the telephone company circulated the directory in that area of California adjacent to Parker, Arizona. After the parties had completed discovery with respect to jurisdiction and had extensively briefed the subject, the District Court found that the Defendants lacked minimum contacts with the State of

California sufficient to afford the Court personal jurisdiction over them. (Appendix D).

Plaintiff took a timely appeal to United States Court of Appeals for the Ninth Circuit. In a split decision embodied in its Order of October 3, 1984 (Appendix A), the Court of Appeals reversed the District Court and remanded the action for further proceedings. The Court ruled that Drs. Merchent and Meyers' contacts with California were too tenuous to support a finding of general jurisdiction since the doctors were not California residents, were not licensed to practice in California, and did not treat Mr. Cubbage in California. The Court did, however, find that limited jurisdiction existed over the doctors, citing the decision in *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977).

The Court found that Drs. Merchent and Meyer had purposely availed themselves of the privilege of conducting activities in California by possessing a Medi-Cal provider number and maintaining a listing in the white pages of the Parker, Arizona telephone directory. The majority then inexplicably found that the Plaintiff's claim "arose out of or related to" the defendants' sparse forum-related activities, because the defendants' forum activities were "enhanced by [Plaintiff's] California residence because that residence is the focus of [Defendants'] activities out of which the suit arises." The record before the Court, however, indicates that Plaintiff was not a Medi-Cal patient, nor does the record suggest that Plaintiff was even aware of, much less relied on defendants' listings in the Parker, Arizona telephone directory. In sum, nothing in the Court's factual recital suggests that Plaintiff's claim "arose out of or related to" the defendants' California-related activities.

Judge Hug's dissenting Opinion correctly recognized that the telephone listings, the distribution of which defendants had no control, and the obtaining of a Medi-Cal number for billing patients who receive care in Arizona did not constitute sufficient interjection by these doctors into the state

of California to warrant personal jurisdiction for a claim arising out of medical treatment rendered wholly in Arizona. Appendix A, page A-16.

REASONS FOR GRANTING THE WRIT

This Court has consistently held that the due process clause of the Fourteenth Amendment requires that a non-resident defendant have "certain minimum contacts with [the forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 456, 463 (1940). More recently, this Court has declared that even when a defendant's contacts are not systematic or wide-ranging enough in the forum to subject him to "general jurisdiction," jurisdiction may be founded upon the defendant's contacts in the forum state if the particular cause of action "arises out of or relates to" the defendants contacts. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 52 U.S.L.W. 4491, 4492, (April 24, 1984) citing *Schaffer v. Heitner*, 433 U.S. 186, 204 (1977). In the latter case, the forum is said to be exercising "specific jurisdiction." Id. note 8. The Court of Appeals, however, found that specific jurisdiction existed over these physicians even though plaintiff's cause of action did not "arise out of or relate to" the physicians' forum-related activities.

The ruling by the Court of Appeals has at once blurred the distinction between general and specific jurisdiction, undermined the requirements of the due process cause, and contradicted forty years of precedent by this Court. The Opinion of the Court of Appeals is not only inconsistent with its own prior decisions and those of this Court, but also opens the door to the assertion of personal jurisdiction over a massive number of claims against defendants with virtually no relationship with the forum. In the limited factual setting from which this case arises, such a result could have a substantial chilling effect on the availability of medical care to the travelling public. Finally, the Court of Appeal's decision

is in direct conflict with the recent decision rendered by the United States Court of Appeals for the Fourth Circuit, in *Wolfe v. Richmond County Hospital Authority,* No. 84-1024 (4th Cir. 1984), a case which is factually very similar to the present action.

I

THIS DECISION RENDERED BY THE COURT OF APPEALS VIOLATES THE DUE PROCESS CLAUSE AND IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

Rule 4(d)(7), Federal Rules of Civil Procedure provide that in determining whether a Federal Court can exercise jurisdiction over a non-resident defendant, the "long arm" statute of the state where the federal court is located is to be applied. *See also, Keeton v. Hustler Magazine,* 52 U.S.L.W. 4346 (March 20, 1984). The California long arm statute provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of the state or of the United States. California Code of Civil Procedure § 410.10.

This Court has noted that the above statute permits an assertion of jurisdiction over a non-resident defendant whenever permitted by the state and federal constitutions. *Calder v. Shirley Jones,* 52 U.S.L.W. 4349, 4350, note 5 (March 20, 1984).

The party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists. *KVOS, Inc. v. Associated Press,* 299 U.S. 269, 278 (1936). The quantum of proof required to meet that burden varies depending upon the nature of the proceeding and the type of evidence which the plaintiff is permitted to present. *See Data Disc, Inc. v. Systems Technology Associates, Inc.,* 557 F.2d 1280, 1285 (9th Cir. 1977). If the Court determines that it will receive only affidavits or consider written materials, these very limitations dictate that a plaintiff must make only a prima facie showing of jurisdictional facts through the sub-

mitted materials in order to avoid a defendant's Motion to Dismiss. Id. If, however, as in the instant action, the Court permits discovery such as deposition testimony to aid in clarifying the controverted factual questions, the plaintiff is put to his full proof, and must establish the jurisdictional facts by a preponderance of the evidence, just as he would have to do at trial. Id. *See McNut v. General Motors Acceptance Corporation,* 298 U.S. 178, 189 (1936). In the present action, in opposing defendant's Motion to Dismiss, Plaintiff was allowed to take deposition testimony to clarify the controverted factual questions. Thus, the plaintiff is required to establish the jurisdictional facts by a preponderance of the evidence.

The Court of Appeals did not find that Petitioners were subject to the general jurisdiction of California courts. Appendix A, p.A-4. The court found that Petitioners were subject to limited personal jurisdiction pursuant to the tripartite test set forth in *Data Disc, Inc. v. Systems Technology Associates, In.,* 557 F.2d 1280, 1287 (9th Cir. 1977). That test, as applied by the Ninth Circuit in Data Disc and recently articulated by this court in *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 52 U.S.L.W. 4491, 4492, note 8 (U.S. April 24, 1984) requires that the cause of action arise out of or relate to the Defendants' contacts with the forum state. The court found that the key California related activity was the application for a Medi-Cal Provider Number and the receipt of Medi-Cal payments. The Plaintiff in this action, however, was not a Medi-Cal patient.

The other contact cited by the court for these physician petitioners was a white pages listing in the Parker, Arizona

telephone book.[1] The record, however, does not indicate that Plaintiff was even aware of, much less relied on, the petitioning physician's telephone listings. The Plaintiff's claim, therefore, did not arise out of or result from "Petitioner's forum related activities". The court, in *Ballard v. Rawlins*, 101 Ill. App.3d 601, 428 NE.2d 532 (1981), utilized similar reasoning in holding that payments made by the Illinois Department of Public Aid to a Missouri physician did not support jurisdiction by an Illinois court over that physician when the Plaintiff was a private paying patient. 428 N.E.2d at 535.

In *Keeton v. Hustler Magazine, Inc.*, 52 U.S.L.W. 4346 (U.S. March 20, 1984), this court discussed the requirements of specific jurisdiction and held that the Defendant's regular circulation of magazines in New Hampshire was sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, even though the same contacts "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activi-

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[1] The Court of Appeals noted in its Opinion that "[A]lthough a telephone listing, without further solicitation, is not enough in itself to confer jurisdiction, [citations omitted], the hospital took out a yellow page advertisement in the 1982 directory showing the hospital's logo and name in bold print." Appendix A, p. A-7. Actions by the appellee hospital are completely irrelevant as to the question of whether these petitioning physicians have sufficient minimum contacts with the State of California, since the "requirements of *International Shoe* . . . must be met as to each defendant over whom a State court exercises jurisdiction". *Calder v. Jones*, 52 U.S.L.W. 4349 (March 20, 1984) (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)).

Corporate activities cannot be used to establish minimum contacts of a non-resident corporate agent who does not participate in the forum activities. *See e.g., Lehigh Valley Industries, Inc. v. Birenbaum*, 527 F.2d 87, 92-93 (2nd Cir. 1975); *Soares v. Roberts*, 417 F.2d 304, 307 (D.R.I. 1976). The record is devoid of any evidence of agency relationship between the hospital and these petitioning physicians. In addition, no evidence suggests that these physicians participated in any way in the hospital's decision to place a yellow pages soliciting in the Parker, Arizona telephone directory.

ties" 52 U.S.L.W. at 4348. The court focused on the special context of libel in finding jurisdiction. The court viewed the circulation of libelous magazines as causing injury to both the subject of the falsehood and the readers of the magazine whenever and wherever the magazines were circulated. Thus, the Defendant's "regular circulation of magazines in the forum state [was held] sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine." Id. at 4347.

By contrast, the present case involves a claim for personal injuries suffered as a result of alleged medical malpractice. Plaintiff's cause of action is much more localized than libel, for it arises with respect to only a single person in a particular location at a given time. Although these physicians directly or indirectly received Medi-Cal payments from California, Cubbage's cause of action did not arise from Petitioner's California activity. Rather, respondent claims that certain injuries were caused in Arizona by Arizona physicians. The allegedly negligent medical treatment provided by the petitioners, outside the forum state, is not "targeted" at any particular forum, as opposed to intentional, commercial acts which may be directed at a particular state.

This distinction between "mere untargeted negligence" and actions "expressly aimed" at a state, *see Calder v. Jones*, 52 U.S.L.W. 4349, 4351 (March 20, 1984), is a crucial factor in the jurisdictional calculus required by the due process clause. As noted by the Court in *Data Disc, supra,:*

> It may be unreasonable to subject an out-of-state defendant to jurisdiction where the alleged tortious act is committed outside of the forum state, having only an affect within the state, if the act is negligent rather than purposeful.

557 F.1288. In sum, the *Keeton* standard for specific jurisdiction is simply inapplicable herein, and the contacts of these Petitioners do not support a finding of general jurisdiction.

General Jurisdiction may be found in the absence of a relationship between a non-residence defendant's contacts with the forum and the cause of action when the defendant engages in the "continuous and systematic" pursuit of general business activities in the forum state. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 448 (1952). The court's holding in *Perkins* that Due Process did not prevent the exercise of jurisdiction was based on careful scrutiny of the defendant corporation's activities in the forum state. There, the Chief Officer maintained an in-state office where he kept company files, carried on company correspondence, held Directors' meetings, and supervised company policies concerning the occupied foreign site of operations; the company's financial affairs were also handled through in-state banks. Id. at 447-48. *Perkins* was expressly distinguished on its facts in *Helicopteros, supra,* where the Court held that the defendant corporation's contacts with the forum state, including the physical presence of a corporate officer for contract negotiations and regular purchases of equipment and training services, were not sufficient to meet the requirements of due process. Id., at 4493, note 5.

Similarly, in the instant action, treatment of a small number of California residents who may or may not be enrolled in the Medi-Cal program cannot be described as an extensive or wide ranging contact with the State of California. These petitioners are not licensed to practice medicine in California, do not reside in California, do not own any real or personal property in California, do not conduct business activities in California, do not have a telephone or bank account in California, and do not pay any taxes to the State of California. The Court of Appeals therefore correctly held that petitioners' lack of contacts with the State of California precluded the imposition of general jurisdiction.

The Court of Appeals, in reasoning that the seminal decision addressing many of the issues raised herein, *Wright v. Yackley,* 459 F.2d 289 (9th Cir. 1972) was inapplicable, found no justifiable difference between this case and those

cases involving "voluntary, interstate economic activity,. . .directed at [another state] in order to benefit from [affect sought]. . ." Appendix A, p.A-9. Nearly every other decision which has considered the question, however, has noted that it is those cases in which the plaintiff travels outside the forum state to seek medical services that the policies underlying *Wright v. Yackley* is most appropros.

In *Wright v. Yackley, supra,* the Plaintiff, a South Dakota resident, was taking medication prescribed to her by a South Dakota physician. The Plaintiff then moved to Idaho, and upon request, the South Dakota physician sent her copies of the original prescription. The Plaintiff obtained the drugs in Idaho pursuant to the South Dakota physician's prescription. Thereafter, the Plaintiff filed suit in Idaho and served the physician under Idaho's long-arm statute, alleging that she was injured by the use of the medication.

The Court in *Wright* found that it was constitutionally precluded from asserting personal jurisdiction over the defendant physician. The Court noted that an exercise of jurisdiction would be unreasonable and would "work contrary to what we deem to be the dominant state interest". 459 F.2d at 289. The Court noted that in the case of "personal services, focus must be on the place where the services are rendered, since this is the place of the receiver's (here the patient's) need. The Court explained that the idea that the tortious rendition of such services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is "wholly inconsistent with the public interest in having [medical] services generally available". Id. at 290. The Court reasoned that "the scope of medical treatment should be defined by the patient's need, as diagnosed by the doctor, rather than by geography". Id.

The *Wright* court further noted that the residence of a recipient of medical services rendered elsewhere is irrelevant and incidental to the benefits provided by the recipient's physician at his own location. Id. Thus, the physician is not

one who "purposely avails [himself] of the privilege of conducting activities within the forum state." Id. Finally, the Court reasoned that a state's dominant interest on behalf of its citizens is not that they be able to sue out-of-state physicians in their home state, rather it is to ensure that its citizens are able to secure adequate medical services wherever they may travel. Id. This substantive state interest precludes in-state inquiry into the sufficiency of out-of-state treatment. Id. *See also, McGee v. Reikhof,* 442 F. Supp. 1276 (D. Mont. 1978); *Simmons v. State,* 670 P.2d 1372 (Mont. 1983).

The Court of Appeals discounted the potential "chilling affect" on the availability of medical care to California residents travelling in Arizona if Arizona treating physicians were subject to suit by California by noting that no specific evidence exists in the record to support such a fear. Appendix A, p. A-9. It is respectfully submitted that one does not need an Affidavit to "prove" what is common sense and every day experience. If treatment in Arizona by an Arizona physician of a California resident's common cold renders that physician subject to suit in California, under California's law, procedure and insurance practices, such treatment will be rendered with great circumspection, if at all.

Finally, the State of Arizona has expressed a strong sovereignty interest in this action by requiring that all actions against a health care provider licensed by the State of Arizona shall be brought pursuant to Arizona's Medical Malpractice Act, before A.R.S. § 12-561 et. seq. Thus, the principles of comity and federalism also mandate that the California District Court refrain from exercising jurisdiction over these petitioning physicians. *See Raffaele v. Compagnia Generale Maritime,* 707 F.2d 395, 398 (9th Cir. 1983).

II.

The decision rendered by the Court of Appeals is in direct conflict with *Wolfe v. Richmond County Hospital Authority,* No. 84-1024 (4th Cir. 1984).

In a case factually very similar to the present action, the United States Court of Appeals for the Fourth Circuit held

in *Wolfe v. Richmond Hospital Authority,* _____ F.2d _____ (4th Cir. 1984), that a hospital located across a river from the forum state did not have sufficient minimum contacts with the forum state to subject it to jurisdiction even though it: (1) treated patients from the forum state, (2) was listed in the telephone directory circulated in the forum state, (3) received medicaid/medicare reimbursements from the forum state, and (4) derived approximately one-fifth of its revenue from the forum's residents.

The Court found that the listing in the telephone directory did not indicate a purposeful contact in order to generate revenue, but instead merely illustrated the proximity of and the close ties existing between Augusta, Georgia and North Augusta, South Carolina. *See also Kennedy v. Ziesmann,* 526 F. Supp. 1328 (E.D. Ky. 1981) (court found that a telephone listing alone, without additional advertising or other solicitation, did not amount "in and of itself to regular solicitation of business and" such that a physician in a neighboring state would be subject to jurisdiction in the state where the directory was distributed).

The court noted that in considering the amount of revenue derived from forum residents, "the fundamental nature of the defendant must be recognized." The court explained that cases involving medical services are "quite different from those involving other commercial activity." The court approved the reasoning in *Gelineau v. New York University Hospital,* 375 F. Supp. 661, 667 (D.N.J. 1974), that the state's interest in insuring that its citizens do not have to leave the state to file suite must be balanced against the burden to those providing the medical services of having to defend themselves in a foreign forum. It was noted that such a burden might ultimately have the counter productive result of reducing the availability of medical services to residents of the forum state. *See Wright v. Yackley, supra.*

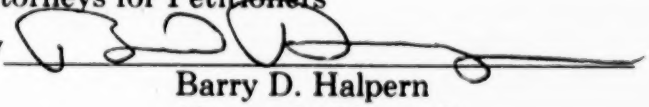
CONCLUSION

For the reasons stated, the Petition For A Writ Of Certiorari should be granted.

RESPECTFULLY SUBMITTED this day of December, 1984.

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v.

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CERTIFICATE OF SERVICE BY MAIL

Barry D. Halpern, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is counsel of record for the petitioners herein.

2. That the Petition For A Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit submitted herewith, and the Appendices thereto, have been served upon counsel for all the parties, in accordance with the provisions of Rule 28 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed to:

Steven B. Stevens
GANTZ AND FORER
280 South Beverly Drive
Suite 208
Beverly Hills, California 90212

Geoffrey Hopper
THOMPSON & COLEGATE
3610-14th Street
P. O. Box 1299
Riverside, California 92502

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28 of this Court.



Barry D. Halpern

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

JEN D. CUBBAGE, Plaintiff-Appellant, v. MICHAEL MERCHENT, S. W. MEYER, PARKER COMMUNITY HOSPITAL, Defendants-Appellees.	NO. 83-6241 DC NO. 83-258 CBM (GX) OPINION

Appeal from the United States District Court
Central District of California
Consuelo B. Marshall, District Judge Presiding

Argued and Submitted: April 3, 1984

Before: KILKENNY, HUG and BOOCHEVER, Circuit Judges. KILKENNY, Circuit Judge:

Appellant, a California resident, filed a medical malpractice suit in Federal District Court for the Central District of California. Jurisdiction was based on diversity. The two appellee doctors live and practice medicine in Arizona, and appellee hospital is located and licensed in Arizona. The district court dismissed the case for lack of personal jurisdiction as to all appellees. Appellant appeals, arguing that under California's long-arm statute appellees had sufficient contracts with the state to support personal jurisdiction.

FACTS AND PROCEEDINGS BELOW

Appellee Parker Community Hospital is an Arizona corporation having its principal place of business in Parker, Arizona. The town is located in a sparsely populated desert region near the Arizona/California border. A bridge connects Parker with California. Appellee doctors Merchent and Meyer are Arizona citizens and are licensed to practice medicine there, but not in California.

During October-November of 1981, appellees treated appellant for an ulcer. Appellant was subsequently transferred to a California hospital on November 13, 1981, at the instigation of Dr. Merchent. Appellees were not responsible for any of appellant's treatment there.

The district court, in granting appellees' FRCivP 12(b)(2) motion to dismiss for lack of personal jurisdiction, included in its findings of fact that (1) a small percentage of the hospital's employees are residents of California — in 1981 sixteen of eighty-seven were California residents; (2) appellees each maintained a listing in the white pages of the 1982 Parker telephone directory, which was distributed in that area of California lying adjacent to Arizona; (3) the hospital also maintained a yellow pages listing in that directory; (4) during a four month period in 1981, approximately 26% of the hospital's patients were California residents who travelled to Arizona for treatment; (5) Dr. Meyer sees approximately 120 patients per week, of whom about 12% are California residents; (6) the doctor appellees applied for and were issued California Medi-Cal numbers; (7) the doctor appellees have treated a small number of patients covered under the Medi-Cal program and have received reimbursement either directly or indirectly from the State of California for those patients.

ISSUE

Do sufficient contacts exist between appellees and the State of California to support assertion of personal jurisdiction over appellees by a district court sitting in California?

DISCUSSION

1. Standard of Review

Even though the trial court did enter findings of fact, the facts are undisputed and therefore we review the court's holding that the exercise of personal jurisdiction is inconsistent with due process de novo as a matter of law. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Clayton v. Republic Airlines, Inc.*, 716 F.2d 729, 730 (CA9 1983) (de novo review for order dismissing for lack of

subject matter jurisdiction). Where a defendant challenges the sufficiency of personal jurisdiction, the plaintiff must bear the burden of establishing that the court does have jurisdiction. *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (CA9 1977).

2. **In Personam Jurisdiction**

The district court's determination of personal jurisdiction is made by examination of the forum state's law. *Hunt v. Erie Ins. Group*, No. 83-2215, slip op. 1453, 1455 (CA9 Mar. 20, 1984). California permits "[a] court of [the] state [to] exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code § 410.10 (West 1973). This statute has been interpreted to confer jurisdiction coextensive with that permitted by due process. *Hunt*, slip op. at 1455; *Data Disc*, 557 F.2d at 1286. Federal law is controlling on the issue of due process. *Amba Marketing Systems, Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 789 (CA9 1977).

Where a defendant has "substantial" or "continuous and systematic" contracts with the state, a state court may have general personal jurisdiction, even if the cause of action is unrelated to the defendant's forum activities. *Data Disc*, 557 F.2d at 1287. Appellees do not have such contacts — the doctors are not California residents, are not licensed in California, and did not treat appellant in California; the hospital is not located, licensed or incorporated in California.

Lacking sufficient contacts or support general jurisdiction, appellees may still be subject to limited personal jurisdiction following "an evaluation of the nature and quality of the defendant's contacts in relation to the cause of action." *Data Disc*, 557 F.2d at 1287. This evaluation must be done on a case-by-case basis, *see Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952), and is derived from *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945), where the Court held that a state court may subject a nonresident defendant to a judgment in personam when that defendant has certain "minimum contacts" with the forum such that maintenance

of the suit there does not "offend 'traditional notions of fair play and substantial justice.' " The *Shoe* requirements must be met as to each defendant over whom jurisdiction is to be exercised. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). Appellee doctors' contacts may be considered generally together with those of appellee hospital, as the district court's factual findings apply similarly to each and both appellees assert similar positions on appeal.

A court judging minimum contacts must focus on the relationship between the defendant, the forum, and the litigation. *Schaffer v. Heitner*, 433 U.S. 186, 204 (1977). This court has established a tripartite test for determining whether due process will allow jurisdiction: (A) some action must be taken whereby defendant purposefully avails himself or herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's laws; (B) the claim must arise out of or result from defendant's forum-related activities; and (C) exercise of jurisdiction must be reasonable. *Data Disc*, 557 F.2d at 1287. We conclude that, upon analysis of these factors, due process will not be offended by assertion of personal jurisdiction over appellees.

(A) Actions by which appellees purposefully availed themselves of the privilege of conducting activities in California.

If appellees have so "purposefully availed" themselves, they should reasonably foresee being haled into California courts. *See World-Wide Volkswagen*, 444 U.S. at 297.

Appellee doctors applied for and received Medi-Cal numbers from the State of California. A Medi-Cal number permits a health care provider to receive reimbursement from the state for services rendered to eligible California residents. *See County v. Lackner*, 97 Cal. App.3d 576, 159 Cal. Rptr. 1 (Ct. App. 1979). Over one quarter of the hospital's patients are California residents, and appellee doctors (and presumably the hospital as well) have received reimbursement from the Medi-Cal program.

Appellee argues that holding a Medi-Cal number should not be considered a relevant "contact" because the hospital does not make money on Medi-Cal patients. Even assuming arguendo the hospital's lack of profit, our focus is on whether appellees purposefully took some action by which they invoked the protection of California law. Appellee doctors purposefully applied for a Medi-Cal number. Appellees invoked the protection of California law by placing themselves within the statutory safeguards provided health care providers seeking to settle grievances or complaints regarding unpaid Medi-Cal fees. See Cal. Welf. & Inst. Code § 14104.5 (West 1980). Under 14104.5, upon exhausting administrative remedies appellees may enter California courts to sue the state for monies owed. Id.; *see, e.g., Royal Conval. Hosp., Inc. v. State Bd. of Control,* 99 Cal. App.3d 788, 160 Cal. Rptr. 458 (Ct. App. 1979).

Moreover, appellees each maintained a white pages listing in the Parker phone directory and the hospital maintained a yellow pages listing. Although a telephone listing, without further solicitation, is not enough in itself to confer jurisdiction, *see Kennedy v. Ziesmann,* 526 F. Supp. 1328, 1331 (E.D. Ky. 1981), the hospital took out a yellow page advertisement in the 1982 directory showing the hospital's logo and name in bold print. Below its name the caption reads: "24 HOUR EMERGENCY; PHYSICIAN ALWAYS ON DUTY; ACCREDITED ACUTE HOSPITAL; FULL SERVICES; MEDICAL & SURGICAL," followed by its address and phone number. The directories were distributed in the adjacent California area because of Parker's proximity to the border and the region's sparse populations, and appellees were aware of the circulation coverage. Such circulation cannot be characterized as "random, isolated, or fortuitous." *See Keeton v. Hustler Magazine, Inc.,* 52 U.S.L.W. 4346, 4347 (U.S. Mar. 20, 1984).

Appellees rely on *Wright v. Yackley,* 459 F.2d 287 (CA 9 1972), this circuit's seminal case on subjecting non-resident medical doctors to personal jurisdiction for treatment rendered in a non-forum state. The court in *Wright* held that

jurisdiction in a district court sitting in Idaho did not lie over a South Dakota doctor who, four months after treating appellant in South Dakota, mailed to appellant copies of the original prescription. Id. at 291. The court noted:

> In the case of personal services focus must be on the place where the services are rendered, since this is the place of the . . . patient's . . . need. The need is personal and the services rendered are in response to the dimensions of that personal need. They are directed to no place but to the needy person herself. It is in the very nature of such services that their consequences will be felt wherever the person may choose to go. However, the idea that tortious rendition of such services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available.

Id. at 289-90.

The Wright court was concerned that

> the amount of contact between defendant and forum state [would be] determined by the chance occurrence of a resident of the forum state seeking treatment by the doctor while in the latter's state. From the very nature of the average doctor's localized practice, there is no systematic or continuing effort on the part of the doctor to provide services which are to be felt in the forum state. [citation omitted].

Id. at 290.

Bearing in mind that jurisdictional inquiry must be made on the facts of each case, we decline to apply *Wright's* broad language here. Appellees do conduct continuing efforts to provide services in California, and have not shown and efforts on their part to discourage California patients. Appellees' advertising and the circulation of telephone directories into California also distinguish this case from *Wright* and cases following it, *see, e.g., Kennedy*, 526 F. Supp. 1328; *Jackson v. Wileman*, 468 F. Supp. 822 (W.D. Ky. 1979);

Glover v. Wagner, 462 F. Supp. 308 (D. Neb. 1978); *Kurtz v. Draur*, 434 F. Supp. 958 (E.D. Pa. 1977); *Gelineau v. New York Univ. Hosp.*, 375 F. Supp. 661 (D. N.J. 1974); *Spokane Eye Clinic, Inc. v. Sup. Ct.*, 63 Cal. App.3d 548, 133 Cal. Rptr. 838 (Ct. App. 1976). In these cases the patient undertook "unilateral activity" in seeking medical treatment. *See Hanson v. Denkla*, 357 U.S. 235, 253 (1958). We find no justifiable difference between this case and those cases involving "voluntary, interstate economic activity, ... directed at [another state] in order to benefit from effects sought [there] ...." *Wright*, 459 F.2d at 290.

There is no evidence in the record suggesting that subjecting appellees to the jurisdiction of California courts will produce a "chilling effect" on appellees in treating California patients. Appellees have not made any showing that they would not treat California patients for fear of being haled before a California court, or that their insurance rates would increase as a result. Unlike the situation in *World-Wide Volkswagen*, appellees in this case were located near the border of the forum state and thus rendition of services to California residents was not an "isolated occurrence." *See World-Wide Volkswagen*, 444 U.S. at 297-98. Appellees' have therefore "purposefully availed" themselves of the privilege of conducting activities in California.

(B) **Appellant's claim must arise out of or result from appellees' forum-related activities:**

As stated above, appellees' relevant contacts with California were the obtaining of a Medi-Cal number and the placing of a telephone listing (and for the hospital, a yellow pages advertisement) in a local phone directory distributed in the adjacent California area. Through directory solicitation and participation in a state health care program appellees were able to attract a substantial number of patients from California. Furthermore, appellees' forum activities were enhanced by appellant's California residence because that residence is the focus of appellees' activities out of which the suit arises. *Keeton*, 52 U.S.L.W. at 4348; *Calder v.*

Jones, 52 U.S.L.W. 4349, 4351 (U.S. Mar. 20, 1984); *contra Wright,* 459 F.2d at 290 (residence of recipient in forum state irrelevant and incidental to benefits provided by defendant in his location). Accordingly, we conclude that appellant's claim arose out of or resulted from appellees' forum-related activities.

(C) **Exercise of jurisdiction must be reasonable:**

This court analyzes several factors in determing the reasonableness of asserting jurisdiction: (1) the extent of purposeful interjection into the forum state; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Ins. Co. of North America v. Marina Salina Cruz,* 649 F.2d 1266, 1270 (CA9 1970).

(1) **Extent of purposeful interjection:**

Appellees did not treat appellant in California, although they did treat a substantial number of California residents, *see Raffaele v. Compagnie Generale Maritime,* 707 F.2d 395, 398 (CA9 1983), did obtain Medi-Cal numbers, and did invoke the protection of California law. *But see Data Disc,* 557 F.2d at 1288 (allegedly negligent action less an interjection than purposeful one).

(2) **Burden on defendant:**

Appellees are unfamiliar with California law. Their insurance carrier, relevant witnesses and attorneys are located in Arizona. Appellees would suffer some inconvenience in being haled before the courts of California, although California is not a "distant" forum, *see World-Wide Volkswagen,* 444 U.S. at 292, because Parker lies roughly the same distance from Los Angeles as it does from Phoenix, site of the district court for Arizona. Further, it is not beyond doubt that California, in applying its choice of law rules, would apply its own substantive law rather than the law of Arizona. *See Hall*

v. Univ. of Nevada, 74 Cal. App.3d 280, 285-86, 141 Cal Rptr. 439, 441-42 (Ct. App. 1977) (where both states have an interest in having their respective laws applied, the court seeks to determine which state's policy would be more impaired if the other state's law were adopted), *aff'd on other grounds,* 440 U.S. 410 (1979).

While choice of law is a separate inquiry from that of personal jurisdiction, *see Keeton,* 52 U.S.L.W. at 4348, the two state's medical malpractice statutory schemes bear certain similarities to each other, *Compare* Ariz. Rev. Stat. Ann. § 12-561 (1982) ("medical malpractice action: defined) *with* Cal. Civ. Code § 3333.1 (West Cum. Supp. 1984) ("professional negligence" defined); Ariz. Rev. Stat. Ann. § 12-564 (1982) *with* Cal. Civ. Proc. Code § 340.5 (West 1982) (limitations of actions); Ariz. Rev. Stat. Ann. § 12-565 (1982) *with* Cal. Civ. Code § 3333.1(a), (b) (West Cum. Supp. 1984) (collateral source evidence rule). They also differ in some respects. *Compare* Ariz. Rev. Stat. Ann. § 12-566 (1982) (specific amount of damages need not be stated) *with* Cal. Civ. Code § 3333.2(b) (West Cum. Supp. 1984) ($250,000 limit for noneconomic losses); Ariz. Rev. Stat. Ann. § 12-567 (1982) (medical liability review panels; no bar to proceeding with future litigation) *with* Cal. Civ. Proc. Code § 1281 *et seq.* (West 1982) *and Wheeler v. St. Joseph Hosp.,* 63 Cal. App.3d 345, 354, 133 Cal. Rptr. 775, 781 (Ct. App. 1976) (arbitration of medical malpractice claims allowed) *and Weeks v. Crow,* 113 Cal. App.3d 350, 352, 169 Cal. Rptr. 830, 831 (Ct. App. 1980) (arbitration agreement waiving right to later jury or court trial). *See also* Ariz. Rev. Stat. Ann. §§ 12-568 (review of attorneys' fees in health care actions), 12-569 (non-admissibility of certain malpractice insurance information); *Air Crash Disaster Near Chicago, Illinois,* 644 F.2d 594, 626 (CA7) (California Supreme Court has not confronted situation under comparative impairment test where states with the most relevant interests also have equal interests), *cert. denied* 454 U.S. 878 (1981).

(3) **Conflict with sovereignty of defendant's state:**

A court should normally refrain from exercising jurisdiction when another state has expressed a substantially stronger sovereignty interest and that state's courts will take jursidiction. *Raffaele*, 707 F.2d at 398. The State of Arizona has not expressed a substantially stronger sovereignty interest in this case. *See Ins. Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702-03 & n.10 (1982) (restriction on state sovereign power discribed in *World-Wide Volkswagen* must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause).

(4) **Forum state's interest:**

California obviously has an interest in protecting its citizens against the tortious conduct of others, including medical malpractice. *See Wright*, 459 F.2d at 290-91. The *Wright* court noted that

> [T]he forum state's natural interest in the protection of its citizens is here countered by an interest in their access to medical services wherever needed.... [A] state's dominant interest on behalf of its citizens *in such a case as this* is not that they should be free from injury by out-of-state doctors, but rather that they should be able to secure adequate medical services to meet their needs wherever they may go....

Id. (emphasis supplied).

We again decline to find the *Wright* court's language controlling. California's interest in allowing its citizens to secure adequate medical treatment is apropos to the factual setting in *Wright*, where the South Dakota-based doctor's only connection with Idaho was the mailing of a prescription made out four months earlier. Appellees here have more significant contacts. Given those contacts, California has a manifest interest here in protecting its citizens from tortious injury by health care providers who solicit and derive a substantial number of patients and revenue from the state, exceeding the interest it has in seeking that its citizens secure adequate

medical treatment wherever they travel. *Cf. McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957). Under the circumstances of this case there is no indication that affording such protection would interfere with California's interest in seeing that its citizens secure adequate medical treatment wherever they travel.

(5) **Most efficient judicial resolution:**

The court sitting in the place the injury occurred is ordinarily the most efficient forum, where that court is most competent at interpreting the applicable law. *Raffaele*, 707 F.2d at 399. As discussed above, it is not clear whether the court in California would apply its own law or the law of Arizona. *See Hall*, 74 Cal. App.3d at 285, 141 Cal. Rptr. at 441; *Air Crash Disaster*, 644 F.2d at 626.

(6) **Convenient and effective relief for plaintiff:**

Appellant is a California resident, California courts are more accessible to him, and California has an interest in protecting its citizens. *See Wolrd-Wide Volkswagen*, 444 U.S. at 292.

(7) **Alternative forum:**

Appellant may bring suit in Arizona.

While mindful of this court's admonition that it may be unreasonable to subject an out-of-state defendant to jurisdiction where the allegedly tortious act is committed outside the forum state, *Data Disc*, 557 F.2d at 1288, we are also cognizant that the reasonableness inquiry is a balancing process, *Ins. Co. of North America*, 649 F.2d at 1273. On balance, we conclude that the exercise of jurisdiction over appellees is reasonable.

3. **Conclusion**

We are not unmindful of the recent decision of the United States Supreme Court in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 52 U.S.L.W. 4491 (U.S. April 24, 1984). That case is not inconsistent with our decision. There the Court held that the corporation's contacts with the State of Texas were insufficient to support an assertion of general

jurisdiction, noting that mere purchases, even if occurring at regular intervals, are not enough to warrant general jurisdiction over a non-resident corporation. Nothing in *Helicopteros* showed that the purchases were related to the cause of action. Here the appellees' receipt of revenue from California residents was part and parcel of the appellant's cause of action and an integral part of the entire factual situation. Appellant's proximity to the California border cannot be likened to the vast separation between the Country of Columbia and the State of Texas.

Consequently, we conclude that, on the facts of this case, assertion of *in personam* jurisdiction over appellees by a district court sitting in California does not offend due process. Accordingly, the decision of the district court is hereby reversed and remanded for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Cubbage v. Merchent, **No. 83-6241**

HUG, Circuit Judge, dissenting:

I respectfully dissent. The treatment of which appellant complains was rendered entirely in Arizona. For the reasons stated in *Wright v. Yackley,* 459 F.2d 287 (9th Cir. 1972), I would affirm the dismissal by the district court.

There was an insufficient showing, in my view, that the forum-related activities justified the assertion of personal jurisdiction in California. The telephone listings in the local Parker, Arizona telephone directory and the obtaining of a Medi-Cal number of billing purposes do not constitute a sufficient interjection by appellees into the state of California to warrant personal jurisdiction for a claim arising out of the medical treatment in Arizona. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), or *Data Disc, Inc. v. Systems Tech. Assoc., Inc.,* 557 F.2d 1280 (9th Cir. 1977).

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

JEN D. CUBBAGE, Plaintiff-Appeliant, v. MICHAEL MERCHENT, S. W. MEYER AND PARKER COMMUNITY HOSPITAL, Defendants-Appellees.	No. 83-6241 DC NO. 83-258 CBM (GX) OPINION AND ORDER ON PETITION FOR REHEARING

Appeal from the United States District Court
Central District of California
Consuelo B. Marshall, District Judge Presiding

Argued and Submitted: April 3, 1984
Argued and Submitted: July 24, 1984

Before: KILKENNY, HUG and BOOCHEVER, Circuit Judges

KILKENNY, Circuit Judge:

Due to an oversight on the part of our Clerk's office, counsel for the appellee hospital were not notified of the time and place of oral argument. This oversight was not called to our attention until the hospital filed its petition for a rehearing on our opinion, *Cubbage v. Merchent*, 732 F.2d 1476 (CA9 1984). To remedy this oversight, we arranged for counsel for both the hospital and Cubbage to present their arguments in a telephone conference.

During the course of the argument, counsel for the hospital cited *Ballard v. Fred E. Rawlins, Inc.*, 101 Ill. App.2d 601, 56 Ill. Dec. 940, 428 N.E.2d 532 (1981); *NTN Bearing Corp. of America v. Charles E. Scott, Inc.*, 557 F. Supp. 1273 (N.D. Ill. 1983); *Guerrero v. Copper Queen Hospital*, 112 Ariz. 104, 537 P.2d 1329 (1975), and *Ada Carol Thompson v. Sun City Community Hospital*, _____ Ariz. _____,

_____ P.2d (1983) (in banc.). In *Ballard* it is clear that the Illinois court did not have before it a factual background such as ours. There seemed to be no showing of a major influx of residents of Missouri into Polaski County, Illinois, nor was there any evidence that the physician in question had advertised in the yellow pages or that the yellow pages had been widely distributed in Missouri. For that matter, the ultimate holding of the court was that "the relative convenience of the location of the *Illinois tribunal* is not sufficient to establish personal jurisdiction over the defendants." 101 Ill. App.2d at _____, 428 N.E.2d at 534 (emphasis supplied). Moreover, the only evidence seeming to link the defendant to Illinois was that he asked the patient for the name of a drug store close to the patient and that such drug store was located in Illinois. 101 Ill. App.2d at _____ 428 N.E.2d at 535. The case of *Lemke v. St. Margaret Hospital,* 552 F. Supp. 833 (N.D. Ill. 1982), in which the same court held that an Indiana doctor who regularly treated Illinois patients solicited by his Indiana hospital could be deemed to be "doing business" in Illinois for purposes of personal jurisdiction, is much closer to our facts than *Ballard* and fully supports our position. *Ballard* is therefore of no help to the hospital in this case.

The hospital next cites to *NTN Bearing Corp.*, 557 F. Supp. 1273, in which an Illinois manufacturer brought suit in the Northern District of Illinois against an Ohio distributor regarding allegedly unpaid commissions. The court in *NTN Bearing* held that Scott, Inc. did transact business in Illinois within the meaning of the Illinois long-arm statute. In passing on the issue, the court said:

> It does not offend traditional notions of fair play and substantial justice to require Scott, Inc. to come once more to Illinois to defend a suit based upon a contract under which it has so frequently and willingly come to Illinois. We conclude that our exercise of jurisdiction over defendant is proper.

Id. at 1277. In the final analysis, the ultimate decision of the court turned on the issue of venue, rather than on jurisdiction. *See* 557 F. Supp. at 1277-80. *NTN Bearing* supports our original opinion rather than the hospital's position.

The hospital also argues that under *Fuerrero v. Copper Queen Hospital*, 112 Ariz. 104, 537 P.2d 1329 (1975), where an Arizona statute was construed as requiring all state-licensed hospitals to provide emergency care, the hospital here was required to accept Cubbage as a patient. In *Guerrero*, as here, the proximity of the hospital to the international border presented "special problems to it and to other hospitals similarly situated." 112 Ariz. at _____, 537 P.2d at 1332. This, of course, would apply to the hospital before us. We find no discernible distinction between an international and a state border in this situation. As mentioned in the opinion, over 25% of the hospital's patients during the four month period were residents of California. As a resort community, Parker can expect a large influx of Californians throughout the year. When the hospital located itself in that position, it was obviously fully aware of the fact that many Californians would be using its facilities.

Ada Carol Thompson v. Sun City Community Hospital, _____, Ariz. _____, _____ P.2d _____ (1983) (in banc), an opinion by the Supreme Court of Arizona, merely affirms *Guerrero*, holding that it was the public policy of that state that a state-licensed hospital may not deny emergency care to an indigent patient without valid cause. The holding in *Thompson* does not detract from federal courts' ability to effectuate the public policy of the state of California to secure jurisdiction under its long-arm statute over citizens of Arizona living along its border and doing business with its citizens.

In any event, the hospital's theory that Arizona statutes would make its citizens, including the hospital, immune from liability under the California long-arm statute if, as we hold, the California long-arm statute gives jurisdiction to California courts under the facts and circumstances of this

case is without merit. Neither the legislature nor the courts of Arizona can interfere with that jurisdiction. We have considered peripheral arguments made by the hospital's counsel, but find them equally without merit.

What is said in *Ballard* in connection with the Illinois long-arm statute being coextensive with the jurisdiction permitted under the United States Constitution is destroyed by the same court's decisions in *Green v. Advance Ross Electronics Corp.*, 86 Ill.2d 431, 427 N.E.2d 1203 (1981), and *Cook Associates, Inc. v. Lexington United Corp.*, 87 Ill.2d 190, 429 N.E.2d 847 (1981), each of which held in substance that the Illinois long-arm statute is not co-extensive with the Due Process Clause of the United States Constitution. Consequently, what is said in *Ballard* to the contrary is not controlling.

After due consideration, the panel votes to deny the petition for rehearing and Judges Hug and Boochever vote to deny the suggestion for a rehearing *in banc*. Judge Kilkenny recommends rejection of the suggestion for a rehearing *in banc*.

The full court has been advised of the suggestion for an *in banc* rehearing, and no judge of the court has requested a vote on the suggestion for rehearing *in banc*. FRAP 35(b).

Judge Hug continues to dissent for the reasons expressed in the dissent to the original opinion.

The petition for rehearing is denied and suggestion for a rehearing *in banc* is rejected.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

JEN D. CUBBAGE, Plaintiff-Appellant, v. MICHAEL MERCHENT, S. W. MEYER AND PARKER COMMUNITY HOSPITAL Defendants-Appellees.	NO. 83-6241 NUNC PRO TUNC ORDER DENYING PETITION FOR REHEARING

Before: KILKENNY, HUG and BOOCHEVER, Circuit Judges.

The petition for rehearing of the appellees Michael Merchent and S. W. Meyer does not comply with Rule 12 of the Rules of the Ninth Circuit which requires, among other things, that the suggestion for a rehearing en banc "shall appear on the cover of the combined petition and suggestion; . . . ." Consequently, we are under no obligation to consider the suggestion for an en banc rehearing. However, we have fully considered the petition for rehearing and find it meritless.

This order denying the petition for rehearing of said appellees is entered nunc pro tunc as of October 3, 1984, the date of filing the previous order denying the petition and rejecting the suggestion for rehearing en banc of the appellee Parker Community Hospital.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JEN D. CUBBAGE, Plaintiff, vs. MICHAEL MERCHENT, D.O.; S. W. MEYER, D.O.; AND PARKER COMMUNITY HOSPITAL, Defendants.	CASE NO. 83-825 CBM(Gx) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

On April 11, 1983, and again on August 1, 1983, defendants Michael Merchent, D.O. (hereinafter "Merchent") and S. W. Meyer, D.O. (hereinafter "Meyer") and the Parker Community Hospital, brought on for hearing their respective Motions to Dismiss for lack of personal jurisdiction before the Honorable Consuelo B. Marshall, United States District Judge. Herbert H. Forer and Steven B. Stevens of the firm of Gantz and Forer appeared as counsel for plaintiff. Peter H. Mason and James P. Muelhberger appeared as counsel for defendants Merchent and Meyer, and Geoffrey H. Hopper appeared as counsel for defendant Parker Community Hospital.

The Court, having considered all moving and opposing papers and all relevant and admissible evidence introduced by the parties and having heard oral argument, makes the following findings:

1. That plaintiff received medical care and treatment at Parker Community Hospital in Parker, Arizona in October and November of 1981;

2. That the defendant physicians Meyer and Merchent are citizens of the State of Arizona, who are duly licensed to practice in the State of Arizona;

3. That the defendant physicians Meyer and Merchent are not licensed to practice medicine in the State of California.

4. That defendant Parker Community Hospital is an Arizona corporation which is located and has its principal place of business in Parker, Arizona.

5. That a small percentage of Parker Community Hospital's employees are residents of the State of California; specifically in 1981, sixteen of eighty-seven employees were California residents;

6. That defendants transferred plaintiff from Parker Community Hospital to Loma Linda University Medical Center in California on or about November 13, 1981;

7. That defendants maintained a listing in the white pages of the 1982 Parker, Arizona telephone book which was distributed in that locale of the State of California which is adjacent to Arizona, and that defendant Parker Community Hospital maintained a listing in the yellow pages of the directory.

8. In 1981, Parker Community Hospital had 11,660 patients. In 1982, Parker Community Hospital had 8,775 patients. During a four month period in 1981, approximately 26% of Parker Community Hospital's patients were California residents who travelled to Arizona for medical treatment.

9. Dr. S. W. Meyer sees approximately 120 patients per week. Approximately 12% of Dr. Meyer's patients are California residents;

10. That defendants applied for and that the State of California has issued, a Medi-Cal provider number to each of the defendants;

11. That defendants have treated a small number of patients covered under the Medi-Cal program and have received reimbursement either directly or indirectly from the State of California for these patients;

12. That the defendants lack those minimum contacts with the State of California sufficient to afford this Court personal jurisdiction over defendants.

Based upon the above findings, the Court orders as follows:

1. That defendants' Motion to Dismiss for lack of personal jurisdiction be granted.

The Court further finds that pursuant to 28 U.S.C. § 1292(b) this Order involves controlling questions of law as to which there are substantial grounds for differences of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of litigation.

IT IS SO ORDERED.

DATED:_____

_____

CONSUELO B. MARSHALL,
Judge
United States District Court